LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
FEB 3 1968

In the Supreme Court

OF THE

United States

October Term, 1967

No. 1091

Second Judicial District Court, State of Nevada, for the County of Washoe, the Honorable Thomas O. Craven, a District Judge therefore, (W. Mark Eddington, Real Party in Interest),

Petitioner,

vs.

State of Nevada,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court
of the
State of Nevada

Morse & Graves,
Robert W. Hughes,
116 South Fourth Street
Las Vegas, Nevada

Attorneys for Petitioner.

INDEX

	Page
A. Opinions Below	1
B. Jurisdiction	2
C. Questions Presented	3
D. Constitutional Provisions and Statutes Involved	4
E. Statement of Facts	6
F. Manner and Time of Raising Federal Questions Before State Court	7
G. Basis for Federal Jurisdiction	10
H. Reasons for Granting the Writ	10
Conclusion	16

Tables of Authorities Cited

Cases

	Pages
Burns Detective Agency v. Doyle, 46 N. 91, 208 P. 427	13
James V. Giles v. State of Maryland, 386 U.S. 66, 17 L. ed. 2d 737, 87 S. Ct. 793	13

Constitutions

Constitution of United States:

Article I, Section 9	5
Amendment V	3, 4, 15
Amendment VI	3, 4, 15
Amendment XIV	3, 5, 15

Constitution of State of Nevada:

Article I, Section 5	5

Statutes

Nevada Revised Statutes:

Section 172.260	6, 14
Section 172.270	3, 6, 14
Section 172.280	6, 14
Section 174.270	15, 16
Section 174.280	4, 6, 16
Section 178.495	6, 9,
Nevada Tort Claims Act, Chap. 505, Laws of Nev. 53rd Ses.	12
Title 28 U.S.C., Section 1257(3)	3

Texts

Wharton's Criminal Law and Procedure, Vol. 4, Section 1716, pp. 478-486, incl.	11

In the Supreme Court

OF THE

United States

October Term, 1967

No.

W. MARK EDDINGTON,
Petitioner,

vs.

THE STATE OF NEVADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of Nevada

Petitioner W. Mark Eddington, by and through his attorneys, Madison B. Graves and Robert W. Hughes, prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of the State of Nevada.

A. OPINIONS BELOW

The Trial Judge sustained a Demurrer to the original Indictment in the above matter on the grounds of misjoinder on November 15, 1966. This decision was not reported nor appealed and under date of

November 29, 1966 the Grand Jury reindicted without taking further evidence although petitioner requested the right to appear and be heard.

The Trial Court issued an order discharging the petition on a Writ of Habeas Corpus on the grounds that the transcript of testimony before the Grand Jury was not sufficient to constitute probable cause for the finding of the Indictment. The State appealed from this order and the Nevada Supreme Court reversed this decision by Opinion filed September 25, 1967, and reported in 432 P.2d 87 (not yet reported in Nevada Official Reports, but referred to by Nevada State Supreme Court as Nos. 50363 and 5364), being Appendix A attached hereto.

A Motion for Rehearing was denied October 20, 1967. (See Nevada State Supreme Court Record.)

Subsequently petitioner filed another Petition for Writ of Habeas Corpus under date of November 2, 1967, setting forth grounds which petitioner felt had not been passed upon in the Opinion of the Supreme Court above mentioned. Thereafter the State obtained an order granting a Permanent Writ of Probition against the District Judge who had issued the Writ of Habeas Corpus and was going to hold a hearing thereon, said Permanent Writ of Prohibition being included herein as Appendix B.

B. JURISDICTION

i. The last judgment of the Nevada State Supreme Court sought to reviewed was entered and filed No-

vember 8, 1967, as appears from Appendix B, which was a continuation of proceedings arising out of a judgment entered and filed September 25, 1967, as appears from Appendix A. All other decisions, both before the Trial Court and the State Supreme Court, were prior to this date.

ii. There was no order regarding a rehearing nor any order granting an extension of time within which to petition for certiorari.

iii. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257 (3).

C. QUESTIONS PRESENTED

1. Do the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States require that a presenation to a Grand Jury be made by an unbiased prosecutor and in a fair manner to grand jurors who are unprejudiced and who do not have a financial interest in the matter?

2. May a State Supreme Court, by use of a Writ of Prohibition, effectively suspend the use of the Writ of Habeas Corpus?

3. Was the evidence presented before the Grand Jury sufficient to justify the finding of an Indictment?

4. Is Section 172.270 Nevada Revised Statutes (hereinafter referred to as N.R.S.), which gives the Grand Jury the power to refuse to hear evidence for the defendant, violative of the Fifth, Sixth and Fourteenth

Amendments of the Constitution of the United States of America as being a denial of due process or denial of equal protection under law?

5. Was petitioner reindicted in violation of N.R.S. 174.280 and thus deprived of constitutional due process?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV., Constitution of the United States, provides in part as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 9, Constitution of the United States, provides in part as follows:

"*Limitations on powers of Congress* . . . .

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. . . ."

Article 1, Section 5, Constitution of the State of Nevada:

"*Suspension of habeas corpus.* The privilege of the writ of Habeas Corpus, shall not be suspend ed unless when in cases of rebellion or invasion the public safety may require its suspension."

Nevada Revised Statutes, Section 172.260 provides in part as follows:

> *"Evidence Receivable before grand jury.*
>
> 2. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

Nevada Revised Statutes, Section 172.270:

> *"Grand jury not bound to hear evidence for defendant, but may order production of explanatory evidence; issuance of process for witness.* The grand jury is not bound to hear evidence for the defendant. It is their duty however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they must order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

Nevada Revised Statutes, Section 172.280:

> *"Degree of evidence to warrant indictment.* The grand jury ought to find an indictment when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

E. STATEMENT OF FACTS

Question 1: The principal prosecutor, Daniel R. Walsh, has represented the State in a previous civil

proceeding involving this defendant and the witnesses who appeared and testified against the defendant before the Grand Jury in a receivership action which was dismissed and later renewed by the State.

On this question the record shows in the transcript before the Grand Jury (see District Court Records) that the prosecutors presented a myriad of hearsay evidence favorable to the prosecution and permitted voluntary statements and prejudicial testimony to be presented. When a witness favorable to the defendant wished to make a hearsay statement he was admonished to refrain from doing so. (Vol. II, Grand Jury Transcript, pp. 330-331.)

Grand juror Manker failed to disclose her financial interest in Mark Twain and participated in returning an indictment. Special deputy Martillano was a stockholder of Mark Twain and had a similar financial interest as grand juror Manker (See District Court Records).

Question 2: Petitioner filed the Petition for Writ of Habeas Corpus (Appendix C) before the Second Judicial District Court of the State of Nevada, in and for the County of Washoe on November 2, 1967. On Monday, November 6, 1967, petition received a telegram which is marked "Appendix E" and annexed to this petition. When counsel appeared pursuant to the telegram he was served with a Petition for Alternative Writ of Prohibition, and after an informal, unreported, in-Chambers hearing on the matter the Supreme Court of the State of Nevada issued a Permanent Writ of Prohibition found in Appendix B.

Question 3: In this connection, the Supreme Court improperly reversed the trial judge, and to demonstrate the lack of understanding in its Opinion the Supreme Court stated:

> "The function of People's under the stock sales agreement has been discharged. A majority of the Board of Mark Twain believed that People's had ceased operations."

As a reading of the transcript before the Grand Jury will reveal this statement is not correct, and as indicated in the Supreme Court record no consideration was given by the Supreme Court to the request of petitioner to correct this misstatement of fact contained in a Petition for Rehearing (Appendix D). It is curious that this particular contention was never made by the prosecution in any argument preceding the Nevada Supreme Court Opinion.

With reference to the other statements in the Supreme Court Opinion to justify a finding that this petitioner might be guilty of embezzlement, the basic error of the Court is that they assumed the contractural obligation of People's terminated when Mark Twain commenced selling insurance. In fact, and as demonstrated by the Grand Jury transcript, Ex. G, the opposite was true.

Question 4: Under this question the only significant point is that in this case the defendant did request by letter, the right to appear before the Grand Jury and be heard and this was denied him. (See Appendix F.)

Question 5: As appears from the original record of the District Court in the devision of Judge John W. Barrett under date of November 15, 1966, while he did direct the case to be submitted to another or the same Grand Jury as provided by statute, he further gave the right to the Attorney General to decide how, when and why he would proceed.

F. MANNER AND TIME OF RAISING FEDERAL QUESTIONS BEFORE STATE COURT

Question 1: In petitioner's judgment the first time the question was properly presented to the state trial or appellate court was by the Petition for Writ of Habeas Corpus filed November 2, 1967, Appendix C herein. This matter was never heard because it was precluded from being heard by the Supreme Court's Permanent Writ of Prohibition, Appendix B.

Question 2: This question is raised before the United States Supreme Court for the first time because, by its action, the Nevada State Supreme Court created this question for the first time. The date of this Writ was November 8, 1967, Appendix B.

Question 3. This question was first determined favorably to petitioner by the Trial Court on May 18, 1967. This determination was reversed by the Supreme Court of Nevada on September 25, 1967, Appendix A. For the reason that petitioner wanted to exhaust all possible remedies before the state courts before seeking relief from the Federal courts and to

raise all possible questions before the state courts, petitioner filed a new Petition for Writ of Habeas Corpus in the state court, Appendix C, raising the other questions, with the exception of Question 2, which are presented in this petition. It is petitioner's position that the time for the consideration of all points here should commence to run from the date of the issuance of the Writ of Prohibition.

Question 4: The first time this question was formally presented to any Nevada court was by Appendix C, and the same has not been ruled on except by the Writ of Prohibition, Appendix B.

Question 5: This question was properly raised for the first time in Appendix C.

G. BASIS FOR FEDERAL JURISDICTION

Not applicable to this case.

H. REASONS FOR GRANTING THE WRIT

Preliminary Comment: Anticipating that the contention might be made that the Permanent Writ of Prohibition pertains only to matters preliminary to the trial of the defendant, W. Mark Eddington, petitioner urges the above entitled Court to rule upon the questions herein now so as to avoid the publicity, expense and time of a trial, the length of which has been estimated at six (6) weeks. The prosecution should be

forced to be fair at all stages, including the accusatory stage, and to refuse to hear this petitioner now for the reason that his case has not been tried and that he might well be acquitted is not fair due process justice. Basically what petitioner is seeking is a rule of law that will require proper conduct at all stages of a criminal proceedings, including an accusatory proceeding. To deny this petition will put the stamp of approval on two systems of criminal justice in the State of Nevada:

First, for those accused by complaint, having the benefit of a preliminary examination, confrontation of accusers, presentation of evidence and cross-examination of witnesses affording an accused of his constitutional rights as compared to,

Second, one where a prosecutor can get a Grand Jury to indict on evidence presented in a one-sided manner and from which hearing the defendant is effectively excluded.

1. As to the question of whether the presentation before a Grand Jury should be made by an unbiased prosecutor, although no cases were found squarely in point on this question, it would seem that this must be so because it would not occur to fair-minded men that the rule should be otherwise. Many questions have been raised where special prosecutors or unqualified prosecutors were presenting cases to Grand Juries. (See Wharton's Criminal Law and Procedure, Vol. 4, Sec. 1716, pp. 478-486 inclusive.)

Mr. Daniel R. Wash, Assistant Attorney General (for the State of Nevada) was an interested, biased and prejudiced prosecutor before the Grand Jury.

Walsh prepared the pleadings and participated in the decision on behalf of the State of Nevada to commence a receivership action against Mark Twain (State of Nevada, ex rel. **Louis T. Mastos v. Mark Twain Life Insurance Company.** Civil No. 26136, District Court of Ormsby County). This case was filed in September, 1965. After the aforesaid action was commenced, the life insurance business of Mark Twain eroded and as a direct result of Walsh's suit, Mark Twain lost in excess of $10,000,000 of insurance business. Stockholders of Mark Twain filed claims against the State of Nevada, its insurance commissioner and attorney general seeking to recover damages exceeding $800,000 for the wrongful receivership action above described. A stockholders' suit, under the Nevada Tort Claims Act was filed on July 13, 1966, **Eddington, et al v. State of Nevada, et al.** These suits were dismissed by mutual consent through negotiation. Both suits have been refiled and the State commenced these criminal proceedings. Walsh has been the principal attorney for the State of Nevada in all proceedings.

The grand jury transcript sets forth that four prosecutors appeared at various times during the three days that the grand jury met. The self-serving, inflammatory and prejudicial statements found in the transcript of the grand jury and this many attorneys appearing is prejudicial to the constitutional rights of

defendant. The statement of Martillaro at pages 226-227, lines 23, 24, 25, 26, 1, 2 and 3 is illustrative:

> Q. Mr. Wood this is an inquiry into the financial affairs of Mark Twain Life Insurance Company and People's Investment Company as to possible misappropriation of funds belonging to these two corporations and also **the relation of other satellite corporations which were used as funnels for moneys misappropriated from Mark Twain Life and People's Investment Company."** (Emphasis added.)

The case of **James V. Giles v. State of Maryland,** 386 U.S. 66, 17 L. ed. 2d 737, 87 S. Ct. 793, although involving a conviction of rape after a trial was had, might shed some light on the concept petitioner is advancing in this petition. Although the Court did not agree on an Opinion in the **Giles** case (supra), the questions involved were similar to the one involved here, namely, was there a denial of due process by an unfair prosecutor. In the **Giles** case apparently the prosecutor suppressed evidence concerning the credibility of witnesses on the issue of consent.

Grand juror, Mary Manker, was a stockholder and policyholder of Mark Twain, and her investment was substantial. The charging of embezzlement in an amount in excess of $300,000 against the officers of her company could not help to prejudice her against petitioner, an officer of Mark Twain. The Supreme Court of Nevada observed in **Burns Detective Agency v. Doyle,** 46 N. 91, 208 P.427, a very early case,

"For where your treasure is, there will your heart be also." (Matthew 6:21)

It is submitted that due process requires a fairer presentation before a Grand Jury, since only one side is there represented, than would the presentation by a prosecutor at a trial of a case.

2. The net result of the rulings of the Nevada State Supreme Court, so far as the petitioner is concerned, is that he has not had a hearing before any Court on the constitutional issues for the reason that the same were not properly before the Supreme Court in the first instance, and when it was sought to bring them before the Trial Court by the use of the habeas corpus writ (Appendix C) the Supreme Court of Nevada precluded the use of this procedure. Although not a technical suspension of the Writ of Habeas Corpus in the sense that it was suspended for all citizens in Nevada, it was, so far as this petitioner is concerned, an effective suspension of the use of the Writ before any of the state trial courts and certainly of the State Supreme Court.

3. On the issue of sufficiency of the evidence, the Nevada court erred in not following the Nevada statutes as to the degree of proof. It is submitted that the Nevada statutes, N.R.S. 172.260(2) and 172.280, when read together, require that there be legal evidence which is sufficient to meet the test of proof beyond a reasonable doubt where the evidence would stand unexplained and uncontradicted.

4. With reference to N.R.S. 172.270 this statute confers upon layman the right to withhold or grant a

fair hearing. In this case, as will appear from the record, this petitioner sought to be heard before the Grand Jury and was denied this right, (as further ap-Grand Jury and was denied this right. (See Appendix F.)

A person proceeded against by complaint, preliminary examination and filing of an Information has a right to present evidence, to confront his accusers and to cross-examine the witnesses, all of these being elements of fair-play due process. To permit a statute to confer upon layman the right to deny due process is violative of the Fourteenth, Fifth and Sixth Amendments of the United States Constitution. It presents a two systems of criminal justice to exist in this country — one by secret indictment and the other by open public accusation. Equal justice under the law cannot permit two completely different systems of criminal justice to exist with the discretion as to which system will be applied left to some appointed or elected official or to a Grand Jury composed of laymen where constitutional guarantees can be swept aside.

5. The contention that petitioner has once been placed in jeopardy in violation of the Fifth Amendment of the Constitution of the United States or should be released pursuant to Nevada statute, is based upon the concept that under N.R.S. 174.270 the trial judge should have directed the case, when he sustained the Demurrer in the first instance on the first Indictment, to be submitted to the same or another Grand Jury. The Trial Court did not properly exercise this prerog-

ative and instead conferred the right of further proceedings upon the discretion of the Attorney General's Office of the State of Nevada. It is submitted that this was not a compliance with N.R.S. 174.270, and that under Section 174.280 the defendant should have been discharged. Perhaps constitutional double jeopardy per se is not involved, but certainly the concept of double jeopardy as reflected in the statute is involved and was violated.

CONCLUSION

It is believed that the question of whether or not a defendant, as a matter of constitutional due process, is entitled to a fair presentation before a Grand Jury is a question of first impression to this Honorable Court and is a question of tremendous importance and the Court should consider it. To refuse to do so leaves open a device whereby two systems of criminal justice can exist in the statutes and be enforced at the will of a prsecutor, be he honorable or dishonorable. It paves the way for a different treatment of our citizens in the field of criminal justice.

The other points involved are not unique but nevertheless are meritorious. A careful reading of the transcript before the Grand Jury and even of the contentions thus far made by the prosecution in this case fail to disclose any evidence to justify an Indictment on the charge of embezzlement and a reading of the entire record, considering the various points raised,

it is submitted will convince this Honorable Court that a grave injustice has been thus far perpetrated on the petitioner in this case.

Lastly, although the Grand Jury system has long been a portion of our law enforcement structure, its initial purpose was to protect the citizen against over-aggression on the part of government law enforcers. It is common knowledge that it no longer serves this purpose and has now been perverted to the position where it gives Star-Chamber criminal justice to those who are unfortunate enough to have this type of an accusation levied against them because a prosecutor desires to handle the matter in this way.

The Petition for Writ of Certiorari should be granted.

Dated, Salt Lake City, Utah,

February 5, 1968

Respectfully submitted,

Robert W. Hughes,

Madison B. Graves,

Attorneys for Petition.

(Appendices A, B, C, D, E and F)